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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JOHN RATELLE, Acting warden of California State Prison at Lancaster, and DANIEL E. LUNGREN, Attorney General of the State of California, *Petitioners*,

v.

LEE PERRY FARMER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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16 pp

QUESTION PRESENTED

Can a criminal defense attorney's informed trial tactic deprive a defendant of his constitutional right to the effective assistance of counsel?

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STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C., § 2254 (1) Petitioners seek review of the memorandum decision of the United States Court of Appeals for the Ninth Circuit in Farmer v. Ratelle, No, 96-56489, reversing the district court's denial of Farmer's petition for writ of habeas corpus. The memorandum decision was filed November 21, 1997. The Court of Appeals denied Petitioners' petition for rehearing January 12, 1998.

CONSTITUTIONS, STATUTES OR REGULATIONS

Sixth Amendment to the United States Constitution. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

California Evidence Code Section 1200. (a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to proved the truth of the matter stated. (b) Except as provided by law, hearsay evidence is inadmissible. (c) This section shall be known and may be cited as the hearsay rule.

California Evidence Code Section 1202. Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had the opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.

California Evidence Code Section 1230. Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that

a reasonable man in his position would not have made the statement unless he believed it to be true.

California Penal Code Section 31. WHO ARE PRINCIPALS. All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

California Penal Code Section 189. All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by an other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree. As used in this section, "destructive device" means any destructive device as defined in section 12301, and "explosive" means exposive as defined in section 12000 of the Health and Safety Code. To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

OPINION OR JUDGMENT BELOW

Farmer v. Ratelle, No. 96-56489.
Farmer v. Ratelle, SACV 94-697 GLT (Eex).
People v. Farmer, 47 Cal. 3d 888, 889-931, 254 Cal. Rptr. 508, 765 P.2d 940 (1989).

STATEMENT OF THE CASE

The California Supreme Court affirmed Farmer's Riverside County convictions of first degree murder, two counts of first degree burglary, the special circumstance finding he committed the murder in the commission of first degree burglary, and enhancements for three prior prison terms, while reversing his death penalty for prosecutorial misconduct in the penalty phase argument. People v. Farmer, 47 Cal. 3d 888, 254 Cal. Rptr. 508, 765 P.2d 940 (1989).

The guilt phase evidence circumstantially established Farmer shot and killed victim Erich Schmidt-Till while burglarizing his apartment. Farmer's defense was that his companion Charles Huffman was the shooter. Id., 899-900.

Following retrial of the penalty phase, a new jury decided on a life sentence without the possibility of parole rather than death.

In his new trial motion in Riverside County Superior Court, his automatic appeal in the California Supreme Court, his motion to dismiss the special circumstance in Riverside County Superior Court, and his habeas corpus petitions in the Riverside County Superior Court, the California Court of Appeal for the Fourth Appellate District, Division Two, the California Supreme Court, and the United States District Court for the

Central District of California, Farmer claimed his original trial attorney was constitutionally ineffective for not introducing in the guilt phase Charles Huffman's confession that he shot Erich Scmidt-Till.

Although the claim was rejected on the merits by all these courts the United States Court of Appeals agreed with Farmer, holding his original trial attorney's strategic decision deprived Farmer of his constitutional right to the effective assistance of counsel.

CERTIORARI SHOULD BE GRANTED TO PREVENT COURTS FROM USING THE SIXTH AMENDMENT TO RESTRICT THE INFORMED TRIAL TACTICS OF CRIMINAL DEFENSE ATTORNEYS

The Court of Appeals held trial counsel's tactical decision not to present Huffman's confession at the guilt phase deprived Farmer of his Sixth Amendment right to the effective assistance of counsel. Focusing on the powerful exculpatory nature of third party confessions, it carved out an exception to the rule that informed tactical decisions of trial counsel should not be second-guessed.

This Court should grant certiorari because the Court of Appeals thereby decided an important federal question -- the Sixth Amendment right to the effective assistance of counsel -- in a way that conflicts with decisions of this Court, federal Courts of Appeals, and state courts of last resort. See, e.g., Strickland v. Washington, 466 U.S. 668, 689-691, 80 L. E. 2d 674, 104 S. Ct. 2052 (1984), U.S. v. Miller, 643 F.2d 713, 714 (10th Cir. 1980), Morgan v. Bunnell, 24 F.3d 49, 52 (9th Cir. 1994), U.S. v. Hardin, 846 F.2d 1229, 1231-1232 (9th Cir. 1988), Sanders v. Trickey, 875 F.2d 205, 208 (8th Cir. 1989), U.S. v. Hughes, 635 F.2d 449, 453 (5th Cir. 1991), McAleese v. Mazurkiewicz, 1 F.3d 159, 166-176 (3d Cir. 1993), U.S. v. Aiello, 900 F.2d 528, 532-533 (2d Cir. 1990), People v. Kelly, 1 Cal. 4th 495, 523, 3 Cal. Rptr. 677, 822 P.2d 385 (1992), People v. Smith, 521 N.E.2d 688, 690, 82 N.Y.2d 731 (Court of Appeals of N.Y. 1993), and People v. Flores, 538 N.E.2d 481, 488 (Ill. 1989). Unless this Court grants certiorari, reviewing courts similarly misreading the Sixth Amendment will further restrict the tactical choices open to criminal defense attorneys.

This case shows the danger of such restrictions. Farmer's trial counsel Joseph Meyers tactically decided not to present possible testimony by Dorothy Hicks

Farmer that Charles Huffman confessed he was the one who shot Eric Schmidt-Till. Meyers made this decision because the prosecutor could impeach such testimony with Huffman's later statement to police detailing the underlying burglaries and naming Farmer as the shooter of Schmidt-Till. (Case No. 96-56489, Farmer's Supplemental Excerpt of Record.)

The state record showed the soundness of Meyers' tactical decision. Meyers knew Dorothy Hicks Farmer was a problematic witness regarding Farmer's guilt (Farmer's Excerpt of Record 134-135), as she revealed when she later testified in Farmer's penalty retrial. (RT 4072-4133.)

She was too nervous to come forward as a witness at the guilt phase. She was Farmer's girlfriend. She engaged in criminal activities with Farmer. She introduced Farmer to Lloyd Reed, the victim's roommate. She confirmed Farmer conducted many earlier drug transactions with Reed in the apartment. She confirmed Farmer was upset because Reed owed him drug money. She confirmed Farmer went to the apartment armed with a firearm on the night of the murder in order to "get blood or money."

She was originally charged in the case along with Farmer. She admittedly lied to police investigating the murder. She helped Farmer hide the murder weapon. She married Farmer so the prosecution could not call her as a prosecution witness. She was sleeping with Huffman when he allegedly boasted to her that he shot the victim.

Huffman's alleged confession to her physically contradicted evidence that Schmidt-Till was shot twice in the face and once below the chest and was alive for some time after the shooting.

Even had Meyers been able to force Dorothy Hicks Farmer to testify, her bias and involvement in the criminal activities surrounding the murder undermined her credibility. She confirmed Farmer was the one who had

drug dealings with Lloyd Reed and was therefore the shooter identified by Schmidt-Till in his dying declaration. She established Farmer's motivation to commit the underlying burglaries. Even had the jury believed Huffman was the shooter, her testimony would have assured Farmer's conviction of the burglaries and of first degree felony-murder as an aider and abettor. Cal. Penal Code, §§ 32, 189. The mistaken identity defense pursued by Meyers, without any impeached testimony from Dorothy Hicks Farmer, sought appellant's acquittal of these charges.

The Court of Appeals nevertheless maintained Meyers could have corroborated Dorothy Hicks Farmer's testimony with his own testimony about confessions Huffman made to him after Huffman was acquitted of the murder in a separate trial. Again, however, several problems confronted such testimony.

The testimony was inadmissible hearsay. Cal. Evid. Code, § 1200. Even though Huffman reneged on his agreement to testify for Farmer by taking the Fifth Amendment, he was not making an admissible declaration against his penal interest when he confessed to Meyers because he had been acquitted of the murder of Schmidt-Till. Cal. Evid. Code, § 1230. Meyers' testimony was only admissible to rebut Huffman's statement to police that Farmer was the shooter, a statement Meyers wanted to keep away from the guilt phase jury because it detailed the underlying burglaries and named Farmer as the shooter. Cal. Evid. Code, § 1202. (Original RT 2907-2911, 3639, 3910-3919; Penalty retrial CT 715; Farmer's Excerpt of the Record 133-135.)

Huffman's confessions to Meyers were not credible. Huffman and Farmer were cellmates throughout their trials. They agreed Huffman would testify for Farmer once Huffman's trial was over. Huffman sat by throughout his own trial while the murder was described in detail and while both the prosecutor and Huffman's

own attorney described Farmer as the shooter. Huffman sat by while his wife Victoria testified that Farmer confessed to being the shooter. Only after Huffman was acquitted of Schmidt-Till's murder did Huffman's attorney allow Meyers to talk to Huffman. (Original RT 977, 3942-3947, 3939; Retrial RT 2816-2819, 2824-2825, 2836-2837, 3368-3369, 3419-3420, 4255, 4265, 4268, 4270, 416-4419, 4480.)

Although Huffman was still trying to reduce his burglary sentence when he talked to police, he had little to lose by falsely confessing to Meyers. On the other hand fingering Farmer as the shooter when he talked to police gave Huffman an undesirable "snitch jacket" as a prisoner. (Original RT 3949.) Faced with Huffman's contradictory statements, the jury would not be inclined to credit his confessions.

Ironically, the original verdict of death confirms the soundness of Meyers' guilt phase strategy not to present Huffman's dubious confessions at the guilt phase and so avoid guilt phase impeachment with Huffman's statement to police.

After the original jury found Farmer guilty of the underlying charges and special circumstances Meyers decided he had nothing to lose by presenting Huffman's confessions at the penalty phase. He could find no one other than himself willing to testify about Huffman's alleged confessions. He testified about Huffman's confessions and was impeached with Huffman's later police statement. The prosecutor argued to the jury that Huffman was lying when he confessed to Meyers. The same jury that convicted Farmer of the crimes and special circumstance returned a verdict of death after considering Huffman's confessions to Meyers impeached by Huffman's later police statement. (Original RT 3908-3909, 4013-4054, 4097, 4215, 4220, 4223-4225.) People v. Farmer, 47 Cal. 3d 888, 917, 254 Cal. Rptr. 508, 765 P.2d 940 (1989).

The Court of Appeals' mistaken assumption that third party confessions should always be introduced restricts the tactical choices open to criminal defense attorneys at trial. The Court of Appeal's mistake is highlighted by the dubious value of Huffman's confessions available to Meyers at the guilt phase when compared with the resulting impeachment undermining Farmer's guilt phase defense to the underlying charges of burglary and first degree felony-murder.

CONCLUSION

This Court noted strategic choices made after a thorough investigation are "virtually" unchallengeable. Strickland v. Washington, 466 U.S. 692. Notwithstanding this language, the Court of Appeals' memorandum decision signals a dangerous trend toward second-guessing informed tactical trial decisions. Because future opinions of this kind will severely restrict the options available to criminal defense attorneys, this Court should grant certiorari. It should plainly state that regardless of the broad category of evidence at issue, an informed tactical choice whether or not to present that evidence at trial does not violate the Sixth Amendment.

Eliminating the qualification, "virtually," will insure the independence of trial counsel while still preserving the Sixth Amendment right to be represented by counsel.

Dated: March 4, 1998.

Respectfully submitted,

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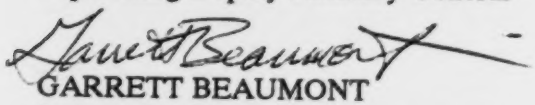

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE NINTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

APPENDIX A

[Filed November 21, 1997]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE PERRY FARMER, Petitioner-Appellant, v. JOHN RATELLE, Warden; DANIEL E. LUNGREN, Attorney General of the State of California, Respondents-Appellees.	No. 96-55964 DC No. SA CV 94-967AHS(EE) MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted August 7, 1997
Pasadena, California

Before: HALL and T.G. NELSON, Circuit Judges, and WINMILL,** District Judge.

Lee Perry Farmer ("Farmer") appeals the district court's denial of his petition for writ of habeas corpus, arguing that the district court should have concluded that Farmer's trial counsel, Joseph Myers ("Myers"), had rendered ineffective assistance. We have jurisdiction under 28 U.S.C. § 2253. We review a district court's decision to deny a § 2254 petition for habeas corpus de novo. Martinez-Villareal v. Lewis, 80 F.3d 1301, 1305 (9th Cir.), cert. denied, 117 S. Ct. 558 (1996). We reverse.

I.

Farmer's claim that his counsel's assistance was so defective as to require reversal of his conviction requires him to satisfy two components. First, he must show "that counsel's performance was deficient" and that Myers "made errors so serious that [he] was not functioning as the 'counsel' guaranteed" by the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 687 (1984). Second, Farmer "must show that the deficient performance prejudiced the defense" and deprived Farmer of a fair trial. Id. Although there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and "[j]udicial scrutiny of counsel's performance must be highly deferential," id. at 689, we conclude that Myers' representation of Farmer at trial was so deficient that it casts substantial doubt on the validity of the jury's verdict.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

** Honorable B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

II.

"A lawyer's first duty is zealously to represent his or her client." Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994).

Myers' refusal to present the most powerful exculpatory evidence available to a defense attorney representing a client in a capital murder case, a third-party confession, exhibits with striking clarity Myers' violation of this primary duty. Only Myers' ineffectiveness can adequately explain his deficient representation at Farmer's trial.

A review of the course of events and the evidence available to Myers before jury selection in Farmer's case was completed brings Myers' deficient performance into clearer focus. Even before jury selection had begun in Farmer's trial, Myers was aware that Dorothy Hicks ("Hicks"), Farmer's wife by the time of the trial, was prepared to testify in detail regarding a meeting between her, Charles Huffman ("Huggman"), and his wife, Victoria Huffman, at a local Burger King restaurant. At the meeting, which preceded his arrest for the murder, Huffman allegedly told Hicks, Farmer's girlfriend at the time, that he, not Farmer, had shot the victim three times, and he expressed surprise that the victim had survived for even a short period of time after being shot. About a week later, Huffman again told Hicks several times that he had killed the victim, confessing to sole responsibility for the murder for which Farmer was charged.

After jury selection in Farmer's trial had begun, Myers visited Huffman twice in custody, once in the county jail and once in the state prison, while Huffman was awaiting sentencing on other charges after having been acquitted of the murder. During Myers' interview on June 27, 1982, Huffman confessed to the killing. On July 15, 1982, after Farmer's jury had been sworn, but before the presentation of evidence had begun, Huffman again

confessed to Myers that he was responsible for the murder for which he had been acquitted and Farmer was now facing trial. For no reason that appears in the record, Myers never took a single note regarding the confessions or memorialized them in any way,[1] failed to bring a corroborating witness (such as his own investigator) to either one, and told no one, least of all his client, about Huffman's jailhouse confessions.

On July 20, 1982, the first day evidence was presented at Farmer's trial, the State's detective conducted a taped interview of Huffman in prison. The transcript of that interview is certainly damaging to Farmer's claim that he did not commit the shooting. Huffman described the shooting in great detail, even including a motive for Farmer to return to Lloyd Reed's home that night: to kill Reed for a $500 debt. Huffman not only described how he supposedly waited outside while Farmer entered the home alone and fired three shots into the victim ("sounded like a cannon"), but he also included Farmer's oral confession to the killing ("Hey I just blown somebody away in there, you know"). Huffman even remembered to tell the detective that when he asked Farmer about the identity of the victim, Farmer told him that Huffman did not know him and would not recognize the name. It is certainly fair to say that this taped interview directly and completely contradicted Huffman's earlier confessions to Myers and Hicks.

On July 28, 1982, during a conference in chambers, Myers indicated his intention to call Hicks to testify to Huffman's confessions. He told the court that if the detective's taped interview were admissible to impeach Hicks' testimony, then he would not call Hicks as a witness. Myers argued, though, that it was "very clear"

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1. Myers did attempt to tape record his second interview with Huffman, but the tape recorder was confiscated by prison officials.

from the tape that "Mr. Huffman is at this point simply angling to get out of prison. And according to other information we have had, doesn't want to make his wife look like a liar." Myers clearly recognized Huffman's credibility problems in giving the taped interview, noting the obvious differences between what he told police a week after the shooting and what he told the State's detective about Farmer's involvement after Huffman had been acquitted of the murder. After some discussion about the admissibility of the interview under California's evidence rules, the trial court indicated that should Hicks testify as expected, it would allow the State to introduce Huffman's taped statement to the State's detective as impeachment evidence.

Even given the court's anticipatory ruling, no reasonable attorney would have been deterred from presenting Hicks' testimony regarding Huffman's multiple confessions. We have previously viewed such evidence as "highly exculpatory" because "third party confessions, if believed, would necessarily exonerate the defendant of the primary offense." Perry v. Rushen, 713 F.2d 1447, 1452 (9th Cir. 1983). Even if not completely accepted by the jury, evidence of a third-party confession casts a dark cloud of reasonable doubt over the guilt of the defendant. There is simply no reasonable explanation for failing to introduce this evidence under these circumstances.

Myers grossly overestimated the evidentiary value of Huffman's tape-recorded statement implicating Farmer in the shooting. The credibility of Huffman's statements to the State's detective was vulnerable to multiple avenues of attack. Given the July 28 conference in chambers, Myers apparently recognized this fact at some point, but for inexplicable reasons, completely discounted this vulnerability and dismissed the possibility of a direct attack on Huffman's taped interview. Directly attacking this evidence, though, had the potential to add powerful persuasive force to Farmer's defense. Huffman had, after

all, just recently been acquitted of the same crime. No one would expect Huffman to suddenly confess to that crime in front of the State's investigators, the same people who had tried so hard to convict him and failed. If Huffman actually committed the shooting, he would not doubt go to great lengths to hide the fact that he had just gotten away with something. Further, at the time of the interview, Huffman was awaiting sentencing on other charges. What better way to curry favor with the State's authorities, who would soon make a recommendation as tot he length of Huffman's sentence, than to provide damning evidence that implicated Farmer in the shooting? A competent attorney would not have allowed this piece of self-serving impeachment evidence to prevent the admission of Huffman's confessions. At a minimum, Huffman's confessions would have provided Farmer's defense attorney with a strong evidentiary argument for reasonable doubt.

Such an obvious approach to countering the State's impeachment evidence apparently occurred to Myers, but was dismissed as insignificant by his illogical pursuit of a witness who could corroborate Hicks' testimony. Myers later stated in his declaration attached to Farmer's habeas petition that he would have called Hicks and endured the State's impeachment evidence if he had only had a "witness untainted by bias or a previous relationship with Mr. Farmer" to rehabilitate Hicks' testimony. Myers did not want just any rehabilitative witness, though, but believed that only a witness who could corroborate Hicks' testimony by testifying to another occasion where Huffman had confessed to the shooting would justify calling Hicks to the stand. That Myers declined to introduce Huffman's confessions--the strongest exculpatory evidence available to a defense attorney in a capital case--during the guilt phase of Farmer's trial simply because he lacked a rehabilitative witness who would testify to another confession by Huffman is difficult to

fathom. Attorneys must deal with impeachment all the time, most commonly on redirect examination following an incisive cross-examination by the attorney representing the other side. Occasionally, the opposition may present an actual witness or physical evidence that rebuts another witness's testimony. Many times, however, attorneys seeking to rehabilitate the credibility of an impeached witness will not have a rehabilitative witness to fall back on. But that certainly does not stop the competent attorney from presenting evidence bearing such strong probative and exculpatory value as the evidence which Myers possessed. The risk that the State would attempt to impeach Hicks' testimony was far outweighed by the risk that Farmer would be convicted absent this evidence.

Besides, Myers had available to him precisely the rehabilitative witness whom he had been seeking: himself. The moment that Myers realized that the trial court would admit the State's tape-recorded statement of Huffman as impeachment evidence to counter Hicks' testimony, Myers should have notified the court of his previous conversations with Huffman and the evidence he possessed concerning Huggman's other confessions.[2] The trial court would have been faced with a decision as to how to proceed and could have (1) appointed limited substitute counsel to represent Farmer during Myers' testimony a rehabilitative witness, or (2) allowed Myers to

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2. Myers' weak notice to the court during the conference in chambers that Huffman had twice confessed to him does not qualify as the type of notice we envision. Myers barely mentioned the other confessions in the context of a specific request for an advance ruling on the admissibility of the State's taped interview. Myers expressly told the court that its ruling ont he admissibility of the taped interview would determine whether or not Myers would call Hicks to testify. Myers should have made clear to the trial court that if the taped interview were ruled admissible, Myers would entertain the possibility that he, himself, would have to testify. This Myers failed to do.

withdraw and appointed permanent substitute counsel. Myers never gave the trial court the chance to make that decision, though, because he told no one about his interviews with Huffman, not even his own client. In the face of the trial court's ruling ont he State's impeachment evidence, Myers sat mute. Myers' explanation that he did not testify himself during the guilt phase because he believed the jury would view his testimony as self-serving and one-sided is wholly unsatisfactory and cannot excuse his failure to call Hicks to testify.[3]

Both parties to this case spend a sizeable portion of their appellate briefs discussing whether Myers labored under an actual conflict of interest. The question of whether or not Myers was faced with a conflict of interest due to his exclusive possession of relevant evidence following his interviews of Huffman, however, misses the point. What is important in this case is that Myers did possess this evidence and could have been a rehabilitative witness to Hicks' impeached testimony. The real significance of the information Myers possessed is that he could have personally played the foil to the State's impeachment evidence, however unreasonable it was to believe that only the existence of such a rehabilitative witness would justify introducing the confessions at all. Myers' ineffectiveness does not turn on the question of whether he was faced with a conflict of interest that should have compelled him to withdraw from his representation of Farmer. Rather, his ineffectiveness is illuminated by his failure to introduce extremely powerful exculpatory evidence of a third party confession, and his weak post-trial excuses for that failure.

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3. Whatever reservations Myers held concerning the one-sidedness of his "self-serving" testimony were apparently dispelled after Farmer was convicted of first-degree murder 12 days later, since Myers testified to the Huffman interviews at the penalty phase of the trial.

This case bears a striking resemblance to the situation we faced in Sanders v. Ratelle. 21 F.3d 1446 (9th Cir. 1994). In Sanders, we held that the defendant's attorney had rendered ineffective assistance of counsel on two independent bases: (1) the attorney had utterly failed to conduct any investigation of the existence of a third-party confession, even though he knew that the third party was willing to confess and had previously done so in the presence of other witnesses, and (2) the attorney was incompetent in failing to present a defense that someone else had committed the murder and failing to introduce the evidence of the third-party confession. Although Myers at least conducted some independent investigation into the existence of Huffman's confessions, he, like the attorney in Sanders, completely failed to present that evidence in support of a defense that someone else had committed the shooting.

After Myers abandoned the "Huffman did it" defense following the trial court's ruling on the admissibility of the State's taped statement, he apparently felt that he was "forced" into relying on the only remaining viable defense: mistaken identification by the victim. This was not a particularly fruitless defense; with his dying breath, the victim told the police dispatcher on the telephone that he had been shot, and provided a description of the perpetrator that seemed to match Huffman as much as Farmer. The victim also noted that he knew the shooter, but could not remember his name. Without other witnesses to the shooting or the appearance at trial of the (by then deceased) victim, however, the mistaken identity defense was based solely on what the victim told the dispatcher at the time of the telephone call.

In Sanders, the defendant also presented a mistaken identification defense, wherein three of the five eyewitnesses to the shooting had at one time identified someone else as the shooter. Id. at 1457. That other

individual was, in fact, the same person who had confessed to the shooting. Given those facts, we held:

> Mistaken identity would have been a plausible, and, quite possibly a successful, defense if Xavier [the confessor] had admitted to the shooting at trial or his admissions had been introduced in lieu of such testimony. Accordingly, [the defense attorney's] failure to call Xavier as a witness or to introduce his admissions, so as to provide [the defendant's] mistaken identification defense with its most powerful possible support, constitutes a strong basis for finding his representation of [the defendant] ineffective.

Id. at 1458. The same circumstances are present in this case. Like the confessor in Sanders, Huffman had a definite motive for killing the victim: the victim supposedly surprised Huffman during a burglary while Huffman was stealing drugs and guns contained in the apartment. Further, as in Sanders, not only were the defenses of mistaken identification by the victim and Huffman's confessions not inconsistent, but Huffman's confessions would have substantially strengthened the persuasive force of the mistaken identity defense. The two defenses would have gone hand in hand; the victim was describing Huffman, not Farmer, to the police dispatcher, as evidenced by Huffman's subsequent confessions. By itself, the mistaken identity defense was relatively insubstantial because there was so little evidence to go on. But combined with the defense that Huffman committed the crime, bolstered by Huffman's confessions, both defenses would have been more convincing, and there is a fair chance that a jury would have been persuaded that reasonable doubt existed as to Farmer's guilt.

Given the evidence available at trial, the "only reasonable strategy" available to Myers, like the attorney in Sanders, "was to pursue what clearly appeared to be the only plausible scenario, as well the only viable defense," id. at 1459; namely, the defense of mistaken identification by the victim, strengthened and corroborated by Huffman's confessions. Myers' complete failure to advocate Farmer's best defense that Huffman committed the shooting, and his failure, without a rational excuse, to introduce the strongest exculpatory evidence available to a defense attorney in a capital case, a third-party confession, amount to ineffective assistance of counsel.

III.

Our holding that Myers was ineffective does not, of course, end the inquiry. Farmer must also demonstrate that he was prejudiced by Myers' incompetent performance. Strickland, 466 U.S. at 694. He must show that "there is a reasonable probability that, absent [Myers' errors, the factfinder would have had a reasonable doubt respecting [his] guilt." Id. at 695. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome" of Farmer's trial. Id. at 694.

We have little trouble concluding that Farmer has adequately demonstrated prejudice to his defense. Myers' incompetence "served to deprive [Farmer] of the most critical evidence supporting his best defense." Sanders, 21 F.3d at 1461. Just as in Sanders, "given the fact that the jury could have been presented with the confession of a person who claimed to be and may have been the 'real' shooter, there can simply be no fair assurance that the verdict would have been the same had [Farmer received effective representation." Id. Therefore, there is a reasonable probability that the result

of Farmer's trial would have been different had he been represented by effective counsel.

CONCLUSION

Because Farmer received ineffective assistance of counsel at trial, we REVERSE the district court's denial of his petition for writ of habeas corpus and REMAND with instructions to grant the writ and order Farmer's release unless the State, within a reasonable time to be established by the district court, decides to retry Farmer.

REVERSED AND REMANDED WITH INSTRUCTIONS.

APPENDIX B

APPENDIX B

[Filed August 29, 1996]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LEE PERRY FARMER, Petitioner, v. JOHN RATELLE, et al., Defendants.	Case No. SACV 94-697 GLT (EEx) ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

For the reasons stated below, the court disapproves the report and recommendation of the Magistrate Judge, and denies the petition for a writ of habeas corpus without a hearing. (The Magistrate Judge's Final Report and Recommendation is ordered filed.)

I. BACKGROUND

A. Procedural History

Petitioner, a state prisoner serving a life sentence without possibility of parole, was convicted of first-degree murder with a special circumstance finding and two counts

of first-degree burglary. Petitioner initially received the death penalty. The California Supreme Court reversed the sentence and remanded for retrial of the penalty phase. People v. Farmer, 47 Cal.3d 888 (1989).

Before the retrial, Petitioner filed petitions for writs of habeas corpus in the Riverside County Superior Court, the California Court of Appeal, and the California Supreme Court. All were denied.

On April 19, 1991, Petitioner's penalty retrial resulted in a sentence of life without possibility of parole. The California Court of Appeal affirmed, and the California Supreme Court denied review.

Petitioner filed successive petitions for writs of habeas corpus in the Riverside County Superior Court and the California Court of Appeal. He sought review by the California Supreme Court, which was denied on June 3, 1993. Petitioner had also filed an original petition for a writ of habeas corpus with the California Supreme Court, which was also denied on June 3, 1993.

On August 8, 1994, Petitioner filed this federal petition for a writ of habeas corpus. The Magistrate Judge recommended granting the petition.

B. Factual History

Petitioner and his codefendant, Charles Huffman, were tried separately for two burglaries of an apartment and the murder of a resident of the apartment, Erich Schmidt-Till. The burglaries occurred on the same night, and the murder occurred during the commission of the second burglary.

Petitioner's family retained Joseph Myers to represent him at trial. In opposing a motion not consolidate Huffman's trial with Petitioner's trial, Myers filed a declaration stating his belief that Huffman, if he were to testify truthfully, would admit sole responsibility for the killing. Myers further declared he intended to call

Huffman as a witness and intended to seek immunity for him if he asserted his Fifth Amendment rights. Huffman was represented at trial by Charles Hewatt, a public defender. Myers sought Hewatt's permission to talk to Huffman, but Hewatt refused.

In March 1982, before his separate trial, Huffman told Hewatt, "I'm the one that did it. I'm the one that shot him. Farmer wasn't even there." Huffman's trial ended before Petitioner's began. Huffman did not testify. He was convicted of the first burglary only. He received a sentence of eight years in prison. After the jury returned a not guilt verdict on the murder charge, Hewatt told Huffman he was "a very lucky man." Hewatt also told him Petitioner's counsel wanted to talk to him. Hewatt notified Myers that Huffman had agreed to meet with him.

On June 16, 1982, jury selection began in Petitioner's trial. On June 27, 1982, Myers went to see Huffman in the Riverside County Jail. Myers later testified Huffman confessed that day to shooting the victim. Myers did not bring an investigator, nor did he take notes or otherwise record his conversation with Huffman.

The jury was sworn on July 7, 1982. On July 15, 1982, Myers again went to see Huffman at Chino state prison. Myers brought a tape recorder with him, but he was not permitted to bring it into the facility. Once again, Myers took no notes of his meeting with Huffman. Huffman admitted to committing the murder and indicated he would be willing to testify for Petitioner. Myers sent his investigator to Chino prison following the second meeting with Huffman, but the prison canceled all visits on the day the investigator attempted to meet with Huffman. Myers made no further attempts to independently document Huffman's statements.

On July 20, 1982, a prosecution investigator met with Huffman. A taped statement was obtained wherein Huffman claimed Petitioner shot the victim.

Opening statements began on July 21, 1982. According to Myers, he intended to call Huffman as a witness at trial. It was Myers' trial strategy to present evidence Huffman was the killer. When he realized Huffman would assert his Fifth Amendment privilege. Myers considered other independent witnesses who might be able to testify about Huffman's statements, but found them to be problematic. Myers did not tell Petitioner that Myers was a potential witness to Huffman's statements.

During the penalty phase, Myers decided to testify for Petitioner. The trial court decided to appoint substitute counsel for Petitioner, but only to represent Petitioner while Myers testified. Substitute counsel advised Petitioner of the nature of the conflict presented by Myers' roles as both advocate and witness. Petitioner then requested Myers be completely removed as his counsel. The trial court refused to appoint substitute counsel for the remainder of the trial. Myers testified and continued as Petitioner's counsel. The jury returned the death penalty.

On November 10, 1982, Myers moved to withdraw as counsel for petitioner. On November 12, 1982, the court permitted Myers to withdraw after Petitioner's family had retained substitute counsel for him.

II. EFFECTIVE ASSISTANCE OF COUNSEL

"The guarantee of effective assistance of counsel comprises two correlative rights: the right to reasonably competent counsel and the right to counsel's undivided loyalty." Fitzptrick v. McCormick, 869 F.2d 1247, 1251 (1989) (citing Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988). In the present case, Petitioner claims both that

his counsel labored under an actual conflict of interest and that he was not reasonably competent in defending him during the guilt phase of his trial.

A. Conflict-Free Counsel

To demonstrate a violation of his Sixth Amendment right to conflict-free counsel, Petitioner "must demonstrate that an actual conflict adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Unlike a challenge of counsel's competency, prejudice is presumed.[1] Id. at 349-350.

1. No Actual Conflict

The "conflict" Petitioner describes in this case is quite different from that normally described in a claim for violation of the right to conflict-free counsel. Petitioner characterizes his "conflict" with counsel in two different ways. However, neither description is actual conflict recognized under the Sixth Amendment.

Petitioner primarily describes the conflict as between Myers' role as attorney for Petitioner, and his role as a possible witness. Once Myers realized Huffman would not take the stand, Petitioner argues, he should have recognized that he was a potential witness and stepped down as Petitioner's counsel. However, Petitioner asserts, Myers did not step down, nor did he take the stand and testify about Huffman's confession because of the conflict he felt between acting as both defense counsel and witness.

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1. "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Strickland v. Washington, 466 U.S. 668, 692 (1984) (citing Cuyler, supra, 446 U.S. at 350, 348.)

This situation, however, does not constitute a conflict resulting in the loss of the undivided loyalty of Petitioner's counsel. The case law in this area is replete with situations in which counsel have ill-served their client due to divided loyalties among different clients,[2] or due to some personal interest of the counsel which conflicts with the interests of the client.[3] The facts of Petitioner's case do not fit either of these situations. Simply put, there is no interest that Myers pursued to the detriment of his client.[4]

A second way of examining the alleged conduct arises from Petitioner's belief that Myers should have withdrawn once he realized Huffman might not testify. Petitioner contends, pursuant to the ABA Code of Professional Conduct, Myers should have stepped down.[5]

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2. Much of the case law on this issue involves counsel who have conflicts with their clients because of some form of multiple representation, or prior representation. See, e.g., Cuyler, supra (multiple representation); Fitzpatrick, supra (successive representation); Mannhalt, supra (same).

3. See, e.g., ?United States v. Hearst, 638 F.2d 1190 (9th Cir. 1980) (counsel's book deal prejudiced his ability to represent defendant).

4. See Cuyler, supra, 446 U.S. at 350 ("But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.").

5. ABA Code Professional Responsibility DR 5-102(A) requires withdrawal from representation if an attorney learns or it is obvious that he ought to be called as a witness on behalf of his client.

California Professional Conduct Rule 2-111(A)(4) states: "If upon or after undertaking employment, a member of the State Bar knows or should know that the member ought to be called as a witness on behalf of the member's client . . . , the member may continue employment only with the written consent of the client. . . ." Rule 2-111(A)(4) was superseded by Rule 3-

Therefore, Petitioner argues, had Myers taken the stand in the guilt phase, he would have exposed himself to discipline for violation of the rules of professional ethics. The evidence, however, does not support Petitioner's contention.

First, there is no indication Myers violated any ethical rule. Disciplinary Rule 5-102(A) of the ABA Code of Professional Responsibility requires an attorney withdraw when he learns or it becomes obvious that he ought to be called as a witness on behalf of his client. This never occurred.

At some point during the guilt phase of Petitioner's trial, Myers learned Huffman would not testify on Petitioner's behalf. Myers Decl. at 4:10-14. Also at some point of the guilt phase, Myers learned the prosecution had obtained a statement by Huffman identifying Petitioner as the trigger-man. Id. at 4:18-23. According to Myers, without the direct testimony of Huffman, "only a witness untainted by bias or a previous relationship with [Petitioner] was likely to be able to effectively challenge the statements which had been obtained by [the prosecution investigator]." Id. at 5:18-22. Because no such witness existed, Myers switched to a defense of misidentification. Id. at 5:22-26. Because Myers' representation of Petitioner served to create a relationship with Petitioner, there is no reason to believe that Myers should have withdrawn in order to testify on Petitioner's behalf. Therefore, Myers did not violate any ethical rules, whose violation in turn created some sort of personal interest manifesting itself in the form of a conflict of interest.[6]

700, which contains no such provision. However, Rule 3-700 was effective in 1989.

6. It is not clear whether an individual can seek the form of relief Petitioner seeks for violations of state ethics rules. C.f.

Second, there is no indication the issue of a disciplinary hearing, or the possibility of such a hearing, was raised in the state proceedings. Therefore, this Court cannot conclude Myers had a personal interest in protecting himself from some form of ethical discipline.[7]

2. No Adverse Effect

The second part of the Cuyler standard requires the attorney-client conflict have "adversely affected" the attorney's performance. Cuyler, supra, 446 U.S. at 348. Even if the Court assumes Petitioner's attorney had a conflict with his client, any such conflict did not adversely affect his representation of Petitioner. Within the record before the Court there is no indication Myers' decision not to testify during the guilt phase was a result of a conflict between his own interests and those of his client.

Myers' decision in the guilt phase not to testify, nor to put other witnesses on the stand, with knowledge of Huffman's statement, was a tactical one. Myers realized that introducing evidence of Huffman's statement

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United States v. Mett, 65 F.3d 1531, 1537 (9th Cir. 1995) ("[P]ersons seeking postconviction relief on the basis of attorney conflicts of interest are limited to asserting their Sixth Amendment right to conflict-free counsel. Violations of other rights they may have had at trial, such as those arising under state ethics rules, are not redressable under § 2255.")

7. The facts of this case are quite different from those of United States v. Iorizzo, 786 F.2d 52 (2d Cir. 1986), in which the Second Circuit found a conflict of interest existed between defendant and his counsel due to the attorney's prior representation and the ethical obligations owed as a result of that representation. The court noted: "[T]he spectre of a disciplinary hearing was explicitly raised, and defense counsel was on warning that further inquiry would be at risk to is professional reputation and employment." Id. at 57-58. There is no such evidence in this case.

would result in impeachment by the prosecution investigator's recording of Huffman's statement identifying Petitioner as the killer.[8] Myers also determined any remaining witnesses, including himself, presented credibility problems and would be more harmful than helpful to Petitioner.[9]

Concerning his own possible testimony at trial, Myers' reason for not taking the stand was a tactical one. According to Myers, he did not testify during the guilt phase because he felt the jury would consider his testimony "completely self-serving and 'one -sided.'" Id. at 6:21-23. This is not evidence of a conflict adversely affecting Petitioner's defense. There is no indication in the record of Myers not taking the stand during the guilt phase in order to advance his own interests.[10] Rather,

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8. See Myers Decl. at 5:18-22.

9. According to Myers:

> It was my belief that Dorothy Hicks Farmer, who had married [Petitioner] shortly before the trial, would be viewed with enormous distrust, and might even prejudice my client's position further. . . . A "parade" of hardened felons, covered with tattoos and in obvious custody, would be seen by a jury as no more than a group of my client's friends, anxious to lie on his behalf. . . . And, of course, such individuals would help perpetuate the atmosphere of "guilt by association". . . .

Id. at 4:26-5:11.

10. For instance, there is no indication from the record that Myers failed to take the stand in order to avoid the disclosure of any possible ethical violation on his part. This stands in contrast to the case of United States v. Iorizzo, discussed supra, n. 6. In that case, defendant's attorney refrained from cross-examining a particular witness due to his own ethical concerns. Iorizzo, supra, 786 f.2d at 58. "The decision to forgo inquiry was thus made solely

Myers specifically states he did not take the stand because he felt he would not be a credible witness. Myers did not act to further his own personal interests at the expense of his client. He sought to aid his client, and Myers felt his own testimony would not benefit Petitioner.[11] Therefore, there was no adverse effect on Myers' performance as counsel.

B. Competency of Counsel

To establish ineffective assistance of counsel in violation of the Sixth Amendment, Petitioner must show two elements: (1) constitutionally deficient performance, and (2) prejudice. Strickland v. Washington, supra, 466 U.S. at 687; Paradis v. Arave, 954 F.2d 1483 (9th Cir. 1992).

1. No Constitutionally Deficient Performance

To establish constitutionally deficient performance, Petitioner must show his counsel's acts and omissions fell below an objective standard of reasonableness. Id.; Smith v. Ylst, 826 F.2d 872, 875 (9th Cir. 1987).

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to protect the interests of defense counsel." Id. In the present case, there is no indication in the record that Myers' decision was anything but a tactical one.

11. Although Myers states he did not realize there was a "conflict," Myers' characterization of the situation as a conflict does not make it so. See Sanders v. Ratelle, 21 F.3d 1446, 1452 (9th Cir. 1994) ("The existence of an actual conflict cannot be governed solely by the perceptions of the attorney; rather the court itself must examine the record to discern whether the attorneys' behavior seems to have been influenced by the suggested conflict.") (Citation omitted).

In the present case, there is no indication of deficient performance by Petitioner's counsel.[12] As discussed above, Myers learned Huffman would not testify and that the prosecution had obtained a statement inculpating Petitioner, Myers made a tactical decision to put on a misidentification defense. He did so only after evaluating the witnesses, available, including himself, and deciding that each witness suffered serious credibility problems.[13] Any witness Myers put on the stand would have probably led to the admission of Huffman's statement to the prosecution investigator. Petitioner has failed to rebut the presumption that Myers' actions represented sound trial strategy. See Strickland, supra, 466 U.s. at 689.

2. No Prejudice

Although the Court finds Petitioner's counsel did not act in a deficient matter, the second requirement of prejudice is also not met. To show prejudice, Petitioner must show there is
"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, supra, 466 U.S. at 686 (1984) at 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

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12. Had Myers violated some ethical provision of the ABA or California Codes, this alone would not necessarily indicate deficient performance. "Prevailing norms of practice reflected in the American Bar Association standards and the like, . . . are guides to determining what it reasonable, but they are only guides." Strickland, supra, 466 U.S. at 688.

13. See Strickland, supra, 466 U.S. at 690 (stating "strategic choices made after thorough investigation of law are unchallengeable").

The Court finds Petitioner has not shown a reasonable probability that he would not have been convicted but for Myers' trial strategy. Any evidence Myers could have put forth would have been derived from Huffman's own statements. Therefore, they would have suffered in credibility because of both his involvement in the burglaries and his later recanting to the prosecution investigator. Any introduction of a confession by Huffman to Myers, or any other individual, would have been impeached by Huffman's later statement inculpating Petitioner. In fact, when Myers did testify during the penalty phase of the trial, the jury returned a sentence of death.[14]

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14. Although not binding on this Court, the California Supreme Court agrees with this Court's finding concerning prejudice. In affirming the denial of Petitioner's motion for a new trial, the Court stated:

> Huffman was an unreliable witness whose testimony, although offered through the mouth of [Petitioner's] attorney, would have been impeached by Huffman's statement to the police inculpating [Petitioner]. Thus testimony by Huffman or by [Petitioner's] counsel regarding Huffman's earlier statements would probably not have led to an outcome more favorable to [Petitioner]. Indeed, as noted above counsel did testify regarding Huffman's admissions at the penalty phase, but the jury returned a verdict of death nonetheless.

People v. Farmer, supra, 47 Cal.3d at 917.

The California Supreme Court, however, did not reach the issue of competency of counsel. In rejecting Petitioner's appeal on the basis of incompetent counsel, the Court explained it could not find incompetence because the appellate record shed no light on why Petitioner's counsel acted as he did during the trial. Id. at 916.

III. NO HEARING REQUIRED

"Dismissal of a habeas corpus petition without a hearing is warranted when the record and files show conclusively that the petitioner is entitled to no relief." Hernandez v. Schneckloth, 425 F.2d 89, 90-91 (9th Cir. 1970) (citations omitted). In the present matter, the Court has had the benefit of the complete state record, two rounds of briefing by the parties, and the magistrate judge's recommendation. With these resources before it, the Court finds it appropriate to deny Petitioner's claim of ineffective counsel without an evidentiary hearing.[15]

DATED: August 28, 1996

GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

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15. To the extent Petitioner seeks relief due to newly discovered evidence not available during the guilt phase of the trial, this claim is also denied. Huffman's statements are not newly discovered evidence. They were known from the beginning of Petitioner's trial. See People v. Farmer, supra, 47 Cal.3d at 917 ("Here, Huffman's statements were not "newly discovered," because at least [Petitioner's] counsel, to whom the alleged confessions were made, knew of them from the outset.").

APPEAL R/R

U.S. DISTRICT COURT
Central District of California (Southern Div)

CIVIL DOCKET FOR CASE #: 94-CV-697

Lee P Farmer v. John Ratelle, et al
Assigned to: Judge Gary L. Taylor
Referred to: Magistrate Judge Elgin C. Edwards
Demand: $0,000 Nature of Suit: 530
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

LEE PERRY FARMER petitioner	John G Cotsirilos [COR LD NTC] Elizabeth A Missakian [COR LD NTC] John G Cotsirilos Law Offices 2442 4th Avenue San Diego, CA 92101 619-232-6022
v.	
JOHN RATELLE respondent	Garrett Beaumont 619-237-7075 [COR LD NTC] Janelle B Davis 619-237-7770 [COR LD NTC] CAAG Office of Attorney General of California PO BOX 85266 110 West A St, Suite 1100

San Diego, CA 92186-5266
619-645-2001

Docket as of October 1, 1996 2:46 pm Page 1
ATTORNEY GENERAL STATE
OF CALIFORNIA Garrett Beaumont
respondent [See above]
[COR LD NTC]
Janelle B Davis
(See above)
[COR LD NTC]

Docket as of October 1, 1996 2:46 pm Page 1 (Cont.)

Proceedings include all events.
8:94cv697 Lee P Farmer v. John Ratelle, et al
APPEAL R/R

8/8/94	1	PETITION FOR WRIT OF HABEAS CORPUS by petitioner in state custody. (cjv) [Edit date 10/01/96]
8/8/94	--	CASE REFERRED to Magistrate Judge Elgin C. Edwards (cjv)
8/8/94	2	NOTICE and ORDER of Reference to Magistrate Judge Elgin C. Edwards requiring answer to petn for writ of H/C nlt 20 dys aft filing date of this ord and instructions re furth proc. (cjv) [Entry date 09/07/94]
9/8/94	3	ORDER by Magistrate Judge Elgin C. Edwards requiring answer to petn for writ of H/C nlt 20 dys aft flg the ans is ext to 20 days frm the date of this ord. by Magistrate Judge Elgin C. Edwards CR: not present (tt) [Entry date 09/21/94]
9/9/94	4	APPLICATION for enlrgmnt of tm to file resp's rtn to petn for writ of H/C by respondent John Ratelle, respondent AGCA (krpa) [Entry date 09/20/94]

9/26/94 6 RETURN TO PETITION by respondent [1-1] (tt)

10/26/94 7 APPLICATION for enlargement of ti to file res suppl ans by respondent John Ratelle, respondent AGCA (lisp) [Entry date 10/31/94]

10/27/94 8 ORDER ext ti of 30 days to file suppl ans until 11/25/94 by Magistrate Judge Elgin C. Edwards (lisp) [Entry date 10/31/94]

11/28/94 9 SUPPLEMENT by respondent John Ratelle, respondent AGCA re answer response [6-1] (lisp) [Entry date 11/29/94]

11/28/94 -- LODGED 3 boxes submitted by respondent John Ratelle, respondent AGCA (FWD TO CRD) (lisp) [Entry date 11/29/94]

11/28/94 10 NOTICE of lodging copies of transcripts by respondent John Ratelle, respondent AGCA (lisp) [Entry date 11/29/94]

12/19/94 11 APPLICATION for enlargement of ti to file traverse by petitioner Lee Perry Farmer (lisp) [Entry date 12/21/94]

12/19/94 -- LODGED order submitted by petitioner Lee Perry Farmer (FWD TO CRD) (lisp) [Entry date 12/21/94]

12/21/94 12 ORDER by Magistrate Judge Elgin C. Edwards granting application [11-1]: Traverse is not due until 1/23/95. (cjv) [Entry date 12/23/94]

Docket as of October 1, 1996 2:46 pm Page 2 (Cont.)
Proceedings include all events.
8:94cv697 Lee Perry Farmer v. John Ratelle, et al
APPEAL R/R

1/23/95	13	TRAVERSE by petitioner Lee Perry Farmer to [6-1] (lisp) [Entry date 01/26/95]
8/18/95	14	MINUTES: The crt ord that the letter & verification be fld submitted by petr by Magistrate Judge Elgin C. Edwards CR: n/a (tt) [Entry date 08/22/95]
8/18/95	15	NOTICE OF FILING REPORT AND RECOMMENDATION of U.S. Magistrate Judge Elgin C. Edwards (tt) [Entry date 08/22/95]
8/18/95	16	REPORT AND RECOMMENDATION of U.S. Magistrate Judge Elgin C. Edwards (tt) [Entry date 08/22/95]
8/21/95	19	LETTER re verification from petitioner Lee Perry Farmer (lisp) [Entry date 11/07/95]
9/1/95	17	OPPOSITION by respondent John Ratelle, respondent AGCA to Report and Recommendation [15-1] (tt) [Entry date 09/06/95]
9/11/95	18	MOTION to adopt the R&R & RESPONSE by petitioner Lee Perry Farmer to [17-1] (tt) [Entry date 09/26/95]

8/29/96 20 FINAL REPORT AND RECOMMENDATION of U.S. Magistrate Judge Elgin C. Edwards on a petn for writ of H/C by a person in state custody; ORD that the Crt apprv the rr fld on 8-18-96 & this final rr ent jgm granting the petn & ord resp to dism the chrgs against petnr in Riverside County Supr Crt case no CR-18777 & rel from

custody or commence a new trial w/i 60 days of the jgm herein; (ENT-8-30-96) (krpa) [Entry date 08/30/96]

8/29/96 21 ORDER by Magistrate Judge Elgin C. Edwards denying writ of habeas corpus petition [1-1]; In the pres matter the Crt has had the benefit of the complete state rcd 2 rounds of br by the ptys & the Mag Jdg's recommendation; w/ these resources before it the crt finds it approp to deny petnr's clm of ineffectiveness cnsl w/o an evid hrg; (ENT-8-30-96) Mld ntc of entry to cnsl/ptys; MD JS 6 (krpa) [Entry date 08/30/96]

9/19/96 23 PETITION/NOTICE OF MOTION FOR A CERTIFICATE OF PROBABLE CAUSE [SIC] TO APPEAL or in the alternative, FOR CERTIFICATE OF APPEALABILITY, Motion to proceed in Forma Pauperis by petitioner Lee Perry Farmer (FWD CRD) (fvap) [Entry date 10/01/96]

9/23/96 22 NOTICE OF DISCREPANCY AND ORDER to fi & process the mtn to proceed ifp, & ntc of appeal ldgd on 9-19-96 by Magistrate Judge Elgin C. Edwards (cc: all counsel) (krpa) [Entry date 09/27/96] [Edit date 10/01/96]

APPENDIX C

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEE PERRY FARMER,

Petitioner-Appellant,

v.

JOHN RATELLE, Acting Warden of the California State Prison at Lancaster,

Respondent-Appellee.

No. 96-55964

On Appeal from the United States District Court
for the Central District of California
No. CV-006970GLT (Eex)
The Honorable Gary Taylor, Judge

APPELLEE'S PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE PERRY FARMER, Petitioner-Appellant, v. JOHN RATELLE, Acting Warden of the California State Prison at Lancaster, Respondent-Appellee.	No. 96-55964

INTRODUCTION

Appellee petitions for a rehearing of this Court's November 21, 1997, unpublished opinion reversing the district court's denial of Farmer's petition for writ of habeas corpus. The opinion overlooked the following material points of fact or law (FRAP 40 (a)): 1) deference was owed to historial factual findings made by the California state courts when previously rejecting Farmer's claims; 2) Meyers told Farmer about his interview with Huffman; 3) there were no witnesses other than Meyers then willing to testify about Huffman's confessions and Meyers' testimony was inadmissible hearsay.

ARGUMENT

I.

THE STATE COURT DECISIONS DENYING FARMER'S CLAIM WERE ENTITLED TO DEFERENCE

This Court's opinion did not deal with the deference due historical findings of fact made by the state courts previously rejecting Farmer's claims of conflict of counsel and constitutionally ineffective assistance of counsel. 28 U.S.C. § 2254(d); Sanders v. Ratelle, 21 F.3d 1446, 1451 (9th Cir. 1994)); Rogers v. Zant, 13 F.3d 384, 387, n.5 (9th Cir. 1994); Ellefson v. Hopkins, 5 F.3d 1149, 1151 (8th Cir. 1993); McAleese v. Mazuriewicz, 1 F.3d 159, 168 (3rd Cir. 1993)); Burden v. Zant, 498 U.S. 433, 436-437, 112 L. Ed. 2d 962, 111 S. Ct. 862, 864 (1991) (per curiam); Appellee's Brief 12-33.

The Riverside County Superior Court rejected Farmer's claims when denying Farmer's new trial motion after considering the evidence and arguments for and against the motion. (CR 10; Crim. 22960, 26 RT 4206-4226; Appellee's Brief 19-22, 29.) So did the California Supreme Court when considering Farmer's automatic appeal. People v. Farmer, 47 Cal. 3d 888, 917, 254 Cal. Rptr. 508, 765 P.2d 940 (1989); Appellee's Brief 29-30, 39. The Riverside County Superior Court revisited the claims and rejected them in a written May 3, 1990, ruling denying Farmer's state habeas corpus petition. (CR 10; 3 CT 715-716; Appellee's Brief 4, 30-31.) After considering evidence and arguments, the Riverside County Superior Court again rejected them by denying Farmer's request to strike the special circumstance in the interest of justice.

(CR 10; E009513, 5 CT 1212-1321, 21 RT 5383-5393; Appellee's Brief 4, 30-31.)

While the summary denials of Farmer's later state habeas corpus petitions did not qualify for deference (Appellee's Brief 5, 31-32), *all* the foregoing rulings did. They either found Meyers made a reasonable tactical choice not to testify about Huffman's post-acquittal confession at the guilt phase because he felt the limited value of his testimony would be outweighed by impeachment with Huffman's detailed statement to police confirming Farmer was the shooter (Appellee's Brief 13-32); or that it was not reasonably probable a different verdict would have been reached had Meyers acted differently, especially considering the death verdict returned by the same original jury who heard Meyers' penalty phase testimony about Huffman's confession (Appellee's Brief 38-44).

II.

MEYERS TOLD FARMER ABOUT HIS INTERVIEW WITH HUFFMAN

This Court's opinion assumed Meyers did not tell Farmer about his interviews with Huffman. (Slip Op. 4, 8.) Not so.

At the hearing on Farmer's unsuccessful new trial motion, Meyers testified he told Farmer about his first interview with Huffman the next time he saw Farmer. (CR 10; Crim. 22960, 26 RT 4214; Appellee's Brief 19.)

From the very beginning Farmer was involved in the plan to pin the shooting on Huffman. Farmer and Huffman were cellmates throughout both their trials. (CR 10; E009513, 15 RT 4480.) Even though Huffman sat mute through his own trial while his attorney and the prosecutor both portrayed Farmer as the shooter (CR 10; E009513, 3 RT 2836-2837, 15 RT 4405; Appellee's Brief 23, 26), Farmer told Meyers that Huffman would testify for Farmer after Huffman's trial if it did not put Huffman in jeopardy (CR 10;, Crim. 22960, 26 RT 4222; Appellee's Brief 20).

Farmer's plan did not pan out because after Huffman's acquittal, Huffman unexpectedly reneged on his agreement to testify for Farmer. No one other than Meyers was willing to testify about Huffman's confessions. (Appellee's Brief 15-16, 20, 23-29.) Farmer's conviction was not the result of Meyers' failings.

III.

THERE WERE NO WITNESSES OTHER THAN MEYERS WILLING TO TESTIFY ABOUT HUFFMAN'S CONFESSIONS AT FARMER'S ORIGINAL TRIAL; AND MEYERS' TESTIMONY WAS HEARSAY

This Court assumed Dorothy Hicks would have testified about Huffman's confessions to her at Farmer's original trial. (Slip Op. 3-7.) However, this assumption ignores Hicks' later state court testimony that she was too nervous to come forward and testify for Farmer when he was originally tried. (CR 10; EOO9513, 13 RT 4130.) Although there was a pretrial plan for witnesses like Hicks to testify about Huffman's confessions, no witnesses other than Meyers were willing to testify about Huffman's confessions at Farmer's original trial. (Appellee's Brief 15-16, 20, 23-27.)

Dorothy Hicks' testimony would in any event have been valueless to Farmer. The prosecutor would have had a field day impeaching her as Farmer's wife, who buried the murder weapon out of loyalty to Farmer, and who lied to police because she did not want to be a snitch and was concerned about her own involvement in the crimes. (CR 10; EOO9513, 13 RT 4083-4084, 4129; Appellee's Brief 24-25.) Furthermore Huffman's alleged confessions to her did not match the facts of the shooting. (Appellee's Brief 44.)

Because of an anticipatory trial court ruling that Hicks could testify about Huffman's confessions, this Court also assumed Meyers' own testimony about

Huffman's confessions would have been admitted at the original guilt phase. (Slip Op. 4-5, 7-8.) Not necessarily.

Although the trial court opined in a later written denial of Farmer's state habeas corpus petition that Meyers' testimony was admissible under California Evidence Code section 1202 [inconsistent statement by hearsay declarant], it *sustained* the prosecutor's hearsay objection during the original penalty phase when Meyers proposed to take the stand as a witness, agreeing with the prosecutor that Huffman's confessions to Meyers (unlike his confessions to Hicks) were only made after Huffman's acquittal and were therefore not against his penal interest under California Evidence Code section 1235; it was only after the prosecutor tactically decided to withdraw his objection that Meyers was allowed to proceed with his penalty phase testimony. (CR 10; Crim. 22960, 25 RT 3919; Appellee's Brief.)

CONCLUSION

The district court properly denied Farmer's federal habeas corpus because, as the state courts repeatedly found, Farmer's conviction did not stem from his state trial counsel's failings. Because this Court's opinion missed material points of fats or law in reaching a contrary conclusion, Appellee respectfully asks this Court for rehearing.

Dated: March 4, 1998.

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

Case Name: Lee Perry Farmer v. John Ratelle, Acting Warden of the California State Prison at Lancaster
No. 96-56489

I declare:

I am employed in the County of San Diego, California. I am over 18 years of age and not a party to the within entitled cause; my business address is 110 W. A Street, Suite 1100, P. O. Box 85266, San Diego, California 92186-5266.

On December 3, 1997, I served the attached

Appellee's Petition for Rehearing

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California, addressed as follows:

John Cotsirlos
Attorney at Law
2442 Fourth Avenue, G-8
Los Angeles, CA 90012
[Attorney for Petitioner-Appellant Lee Perry Farmer]

Elizabeth A. Missakian
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San Diego, CA 92101
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Riverside County District Attorney's Office
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Riverside, CA 92501

United States District Court
Central District of California
312 North Spring Street
Room San Diego, CA 92101

I declare under penalty of perjury the foregoing is true and correct, and this declaration was executed at San Diego, California, on December 3, 1997.

ARLENE M. RYAN _____

(Typed Name) (Signature)

APPENDIX D

APPENDIX D

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

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February 11, 1998

Cathy Catterson, Clerk
United States Court of Appeals
Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

RE: Lee Perry Farmer v. John Ratelle, Warden
Ninth Circuit Case No. 96-56489

Dear Ms. Catterson:

Appellee wishes to add the following points to its pending petition for rehearing.

1.) The court erroneously assumed Huffman's confession was "the most powerful exculpatory evidence

available . . ." (Slip Op., p. 2) despite the fact that no one other than defense counsel was willing to testify about the confession (Appellee's Pet. for Reh'g, p. 6); Huffman had nothing to lose because he had just been acquitted (Appellee's Br., pp. 15-16); and the confession would be impeached with Huffman's detailed statement describing Farmer's role in the burglary and his shooting of the victim. (Appellant's Supplemental Excerpt of R., pp. 7-60.)

2.) This Court erroneously concluded there was "simply no reasonable explanation for failing to introduce this evidence [Huffman's confession]" (Slip Op., p. 5) despite the fact that trial counsel's mistaken identity defense, which avoided the admission of Huffman's detailed statement to Officer Lund, could have resulted in Farmer's full acquittal. Huffman's confession, on the other hand, would have led to the admission of Huffman's full description of the underlying burglary and Farmer's involvement in it. (Appellant's Supplemental Excerpt of R., pp. 7-60.) Farmer could then have been convicted of first degree felony-murder whether or not he was the shooter. Cal. Penal Code, § 189.

3. This Court erroneously assumed that when Huffman made his damning statement to Officer Lund, he "was awaiting sentencing on other charges." (Slip Op., p. 6.) In fact he had already been sentenced. (Appellant's Excerpt of R., pp. 3-4.)

4. This Court not only erroneously assumed Dorothy Hicks would testify (Appellee's Pet. for Reh'g, p. 6; CR 10, 13 RT 4101, 4130), it also erroneously second guessed trial counsel's tactics when concluding, "[t]he risk that the State would attempt to impeach Hicks' testimony was far outweighed by the risk that Farmer would be convicted

absent this evidence." (Slip Op., p. 7.) Hicks' later penalty retrial testimony showed she would be a bad witness for Farmer since she confirmed his identity as the man who did drug business with the victim's roommate - the man described as the shooter in the victim's dying declaration - and further

established Farmer's motive to burglarize the residence and therefore his guilt of first degree-felony murder regardless of the shooter's identity. (CR 10; 13 RT 4109-4130.)

Sincerely,

DANIEL E. LUNGREN
Attorney General

GARRETT BEAUMONT,
Supervising Deputy Attorney General

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APPENDIX E

APPENDIX E

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE PERRY FARMER, Petitioner-Appellant, v. JOHN RATELLE, Warden; DANIEL E. LUNGREN, Attorney General of the State of California, Respondents-Appellees.	No. 96-55964 D.C. No. CV-94-00697-GLT ORDER

Before: HALL and T.G. NELSON, Circuit Judges, and WINMILL,** District Judge.

The panel has considered appellant's petition for rehearing. The petition for rehearing is DENIED.

**Honorable B. Lynn Winmill, United States District Judge for the District of Idaho, sitting by designation.

Supreme Court, U.S.
FILED
APR 16 1998
CLERK

No. 97-1448

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JOHN RATELLE, Acting warden of California State Prison at Lancaster, and DANIEL E. LUNGREN, Attorney General of the State of California, *Petitioners*,

v.

LEE PERRY FARMER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997
No. 97-1448

JOHN RATELLE, Acting warden of California State Prison at Lancaster, and DANIEL E. LUNGREN, Attorney General of the State of California,
Petitioners,

v.

LEE PERRY FARMER, *Respondent*.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In his opposition to certiorari Farmer raises several new points in an attempt to dilute the question for review posed by Petitioners: Can a criminal defense attorney's informed trial tactic deprive a defendant of his constitutional right to the effective assistance of counsel?

He maintains his trial counsel Meyers failed to adequately investigate Huffman's confessions to other people besides Dorothy Hicks, namely Huffman's confessions to his own attorney Clarence Hewatt and to prison inmate Charles Nelson.

But with good reason the Ninth Circuit never held Farmer's trial attorney failed to adequately investigate Huffman's confessions to others. Hewatt testified in state court that he and Meyers talked about Huffman's confessions to Hewatt and that Meyers repeatedly asked Hewatt to testify about the confessions

at Farmer's original guilt phase trial. Hewatt refused Meyers' requests because of his concerns about the attorney-client privilege and losing the trust of other criminal defendants. (Penalty Retrial RT 3370-3374, 3430-3432, 3425, 3523, 4270, 4279, 4290-4291.) Prison inmate Charles Nelson testified he would never have come forward as a defense witness at Farmer's original guilt phase trial because of his fear of getting a "snitch jacket." His penalty retrial testimony of Huffman's jailhouse confession was less than compelling given Huffman's penchant for bragging about other crimes he may or may not have committed in order to pose as the toughest man in the tank. (Penalty Retrial RT 4499-4514.) The only witness willing to testify about Huffman's confessions during Farmer's original trial was Meyers himself. (Original Retrial RT 3909.) The Ninth Circuit did not find Meyers' investigation inadequate, candidly distinguishing its Farmer opinion from Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994) on this basis. Appendix A-9.

Farmer also emphasizes that because Huffman described two burglaries to police, the second of which involved Farmer's shooting of Schmidt-Till while alone with Schmidt-Till in the apartment, impeachment with Huffman's statement would not have exposed Farmer to aider and abettor liability for felony-murder. But upon hearing Huffman's statement along with Dorothy Hicks Farmer's testimony describing in detail Farmer's motivation to burglarize the apartment, jurors choosing to believe only part of Huffman's confession or Dorothy Hicks-Farmer's defense testimony could have imputed felony-murder liability to Farmer even if they believed Huffman was the actual shooter. On the other hand, without Hicks-Farmer's testimony and impeachment with Huffman's statement, jurors had acquit Farmer if they believed Meyers' mistaken identity defense.

Farmer emphasizes Meyers did not bring an investigator or memorialize his own interviews with

Huffman. But Meyers was interviewing Huffman as a potential defense witness pursuant to the Farmer-Huffman plan hatched before the Farmer's trial. It was only because Huffman later backed out of the deal that Meyers decided he had to testify himself about the confessions at the original penalty phase. And in closing argument the prosecutor did not question Meyers' credibility; it was Huffman he branded as a liar. (Original Retrial, RT 4097, 4214-4220.) Even Huffman's own attorney, Clarence Hewatt, admitted taking no notes when he interviewed Huffman. (Penalty Retrial RT 3507.)

Farmer points to declarations he got penalty retrial jurors to sign suggesting he should get a new guilt phase trial. But the prosecutor got other statements from penalty retrial jurors containing these additional comments: jurors spent very little time discussing whether Huffman was accurate or bragging when he "confessed (Penalty Retrial CT 1288); most erroneously concluded Schmidt-Till "had to" have been in a confused mental state when he described the shooter notwithstanding a penalty phase stipulation that Schmidt-Till was lucid, designed in to exclude a graphic dispatch audio tape of his final words clearly proving his lucidity (Penalty Retrial CT 908-909, 1269, 1289; RT 232-268); jurors erroneously felt the name "Chuck" in another address phone book in the apartment referred to Huffman and erroneously considered information Schmidt-Till knew Huffman as the apartment maintenance man notwithstanding a limiting instruction that they not do so (Penalty Retrial CT 1269, 1288); they felt they had to be "absolutely certain" Farmer pulled the trigger to give him the death penalty and were not overly concerned about resolving conflicts in the evidence since such conflicts could be resolved with a life without possibility of parole verdict (Penalty Retrial CT 1288, 1291); one juror who expressed concerned that such a verdict would be used by the defense to get Farmer a new trial was assured by others this would not happen (Penalty

Retrial CT 1291-1292). Farmer's new counsel began his opening statement and closing argument at the penalty retrial by assuring jurors Farmer would spend the rest of his life in prison. (RT 3655, 5210.)

Notwithstanding Farmer's opposition to certiorari, this is a straightforward case ideal for certiorari. Farmer simply does not like the unsuccessful but informed trial tactic of his original trial counsel. This Court should grant certiorari and clearly state that an informed tactical choice made by trial counsel does not deprive a defendant of his Sixth Amendment right to counsel.

Dated: April 15, 1998.

Respectfully submitted,

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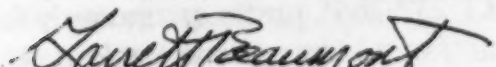

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